DEAN M. ANDERSON

IBLA 85-350 Decided September 30, 1986

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying protest to public land sale. NM 057090.

Affirmed.

1. Administrative Procedure: Adjudication-- Administrative Procedure: Administrative Review--Administrative Procedure: Substantial Evidence--Appeals: Federal Land Policy and Management Act of 1976: Sales

   A decision to include public lands within a parcel for sale under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), where the decision is based upon first-hand knowledge of the land and on substantial evidence, will be affirmed unless appellant presents a preponderance of evidence to support a contrary result.

2. Federal Land Policy and Management Act of 1976: Sales

   Competitive bidding procedures are mandated for public sales under sec. 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1713 (1982), unless equitable considerations or public policies indicate modified competitive bidding or noncompetitive bidding procedures may be employed. Where the lands to be sold are within a developing or urbanizing area, competitive bidding procedures may be appropriate even though an adjoining landowner protests on the grounds the potential uses of the lands may adversely affect him.

APPEARANCES: Dean M. Anderson, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Dean M. Anderson has appealed from a January 8, 1985, decision of the New Mexico State Office, Bureau of Land Management (BLM), denying his protest of a proposed competitive sale of 125 acres in Fairacres, near Las Cruces, New Mexico, originally scheduled for September 17, 1984, pursuant to the provisions of the Federal Land Policy and Management Act of 1976 (FLPMA),

43 U.S.C. § 1713 (1982). Anderson protested sale of the 125-acre tract on July 23, 1984; his protest of the sale was denied by BLM's Area Manager for the Las Cruces Resource Area on August 21, 1984. On September 6, 1984, Anderson filed an appeal of this decision which both raised new arguments and requested a hearing 1/ to permit the development of issues in opposition to the proposed sale. On January 8, 1985, apparently treating Anderson's September 6 appeal as a continuation of his earlier protest, the BLM New Mexico State Director issued a decision which considered and rejected all the arguments raised by both Anderson's September 6 and July 23, 1984, letters. 2/ Timely appeal of the State Director's decision was taken to this Board. The proposed sale was not completed as to the challenged 125-acre tract on September 17, 1984, as scheduled.

Anderson is a resident of Fairacres, where he owns a house which adjoins the 125-acre tract offered for sale by BLM. In July 1984, when the 125-acre parcel was first advertised for sale, Anderson received a copy of the notice of realty action which was issued by BLM and published as required by 43 CFR 2711.1-2. On July 23, 1984, Anderson protested the sale of the 125-acre block of contiguous lands adjoining his property, which comprised only a portion of the lands in Fairacres offered for sale. Anderson argued that he should be permitted to bid for parcel F, a 5-acre portion of the larger 125-acre tract. Parcel F adjoins Anderson's land to the south, and drains toward the Anderson residence. Anderson also argued he should be allowed to take advantage of the modified bidding procedure authorized by 43 CFR 2711.3-2 rather than submit to competitive bidding for the entire 125-acre tract in the fashion required by the BLM notice of sale. In his July 23 protest, Anderson argued further that sale of the 125-acre block of land, including parcel F, was improper for aesthetic reasons and that parcel F should be therefore segregated from the advertised tract and sold to him.

Following the denial of his protest by the Area Manager some informal contacts were had between Anderson and BLM employees at the Area Manager's office, after which Anderson filed his September 6, 1984, appeal. In this document he argues for the first time that the aggregation of a number of

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1/ This request has not been renewed by Anderson in his statement of reasons filed with this Board. There is, however, no foundation upon which this Board could grant such a request in this case, since there is no material issue of fact raised by the appellant which would require a hearing. See 43 CFR 4.415, providing that hearings may only be held upon issues of fact, and allowing the Board to specify issues in cases where a hearing is found to be appropriate.

2/ Since Anderson added a substantive argument on Sept. 6 concerning parcels EE and FF, it was appropriate for BLM to reconsider and address all his arguments in a decision prior to sending the matter to this Board. Cf. 43 CFR 4.450-2. Since the matter under consideration remained at all times an "action proposed to be taken" it was properly handled throughout as a protest. See Willamette Logging Communications, Inc., 86 IBLA 77 (1985).

5-acre parcels of land into the 125-acre tract which was offered for sale by BLM was arbitrary, since it excludes some 5-acre tracts that adjoin the large tract. To support this position, Anderson cites the example of parcels EE and FF, which were also scheduled for the September 17, 1984, land sale as separate 5-acre tracts, despite the fact that they, too, could have been grouped together into a larger tract or grouped with the 125-acre block which included parcel F for purposes of sale.

Finally, in his statement of reasons on appeal to this Board, Anderson repeats his arguments previously made to BLM and expands upon those prior contentions stating that parcel F is unlike the rest of the land in the 125-acre block into which it was incorporated by BLM for sale purposes. He explains that parcel F, together with his property, forms a natural drainage which he wishes to preserve to protect his residential property. He argues that sale of parcel F to him, using the modified bidding procedure permitted by 43 CFR 2711.3-2, will increase the price paid to the United States for parcel F, and therefore produce a greater benefit to the government than a sale which incorporates parcel F into a larger tract for sale. In the alternative, Anderson argues that if the Department continues to refuse to sell him the smaller piece of land, then parcel F should be restricted so that it can be used only for park purposes.

The BLM decision of January 8, 1985, explained the reason the 125-acre configuration was chosen for the Fairacres land adjoining Anderson's property:

> 2. Parcels EE and FF were scheduled to be sold as separate 5-acre parcels, while parcels GG and HH and other parcels, including F, were combined to be sold as one 125-acre block. You indicated that you feel this to be an arbitrary action.
>
> As a result of the protests, we have reviewed the requirements of the law and the regulations and the rationale of the District Manager in arriving at his decision. The reason for the actions proposed in the Notice of Realty Action are as follows:
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> The original method of sale under 43 CFR 2711.3-1, Competitive Sales, was determined to be the best method of sale due to the proximity of the sale area to the developing city of Las Cruces, New Mexico, and the intense public interest in the purchase of public lands adjacent to the Mesilla Valley. This need was addressed in the Management Framework Plan for the Southern Rio Grande Planning Area.
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> Parcel F was combined with the 120 additional acres to sell in one large parcel, as a result of numerous meetings with Dona Ana County, city of Las Cruces officials and staff and based on the evaluation of the topography in the subject area. It was determined that the 5-acre parcel size and the arroyos and gullies in the area were not conducive to residential/commercial building, but are more suited to planning, subdivision and development as a large 125-acre parcel.

> Parcels EE and FF were not included in the large parcel as they were outside of the arroyo that crosses through the major portion of parcels GG and HH.

(BLM Decision at 1, 2). We affirm BLM's decision.

Section 203 of FLPMA, 43 U.S.C. § 1713 (1982), authorizes sales of tracts of public lands, and provides for the exercise of Secretarial discretion in the formation of suitable tracts of land to be sold. The statute provides that "[t]he Secretary shall determine and establish the size of tracts of public lands to be sold on the basis of the land use capabilities and development requirements of the lands * * *." Id. at section 1713(e) (1982). The intent of this provision "is not to give the Secretary unlimited powers, but to allow him the flexibility to make conveyances which are tailored to appropriate land uses." S. Rep. No. 583, 94th Cong., 1st Sess. at 48.

Appellant argues that parcel F should not be included in the 125-acre tract because it is

> atypical of most of the remaining 120 acres. Parcel F slopes north and east while most of the remaining 120 acres slope south and east. In addition * * * [i]f parcels of land should be managed within the dictates of watersheds, and I believe they should, then Parcel F which adjoins my property in an arroyo should together with my property be managed together as a watershed.

[1] We do not question appellant's facts, or the sincerity of his concerns, but we give considerable deference to BLM decisions where they are based on firsthand knowledge of the land and on substantial evidence. Committee for Idaho's High Desert, 85 IBLA 54, 56 (1985); U.S. Fish & Wildlife Service, 72 IBLA 218, 221 (1983). Such decisions may be overcome if an appellant offers a preponderance of countervailing evidence, but not if he simply disagrees. Id. In this case BLM states (and appellant acknowledges) that BLM's decision was based on an evaluation of topography and land use planning and development considerations, that is, on its subjective judgment based on substantial evidence. Although appellant offers an alternative approach for parcel F, it cannot be said that he has presented a preponderance of evidence that BLM's judgment was in error. Rather, as was observed in Rosita Trujillo, 21 IBLA 289, 291 (1975), "[a]ppellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest." We therefore affirm BLM's decision to include parcel F for sale in the 125-acre tract.

[2] We also affirm BLM's decision to conduct the sale using competitive bidding procedures. These are the procedures mandated by the statute unless equitable considerations or public policies indicate modified competitive bidding may be employed. 43 U.S.C. § 1713(f) (1982). BLM's decision states that competitive bidding was selected because the sale area was near the developing city of Las Cruces, New Mexico. This conforms to the policy set forth in 43 CFR 2710.0-6(c)(3)(i) that competitive bidding is the general

procedure where lands are within a developing or urbanizing area and land values are increasing. Although appellant is an adjoining landowner (and that is one of the factors set forth in section 1713(f) for the Secretary to consider in making a decision based on public policies to employ modified competitive bidding procedures), appellant's equitable considerations do not warrant those procedures, even if parcel F were sold separately.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Will A. Irwin
Administrative Judge